IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 25, 2006

STATE OF TENNESSEE v. GRADY WAYNE MEALER

Appeal from the Circuit Court for Marshall County
Nos. 16719 and 16721 Robert Crigler, Judge

No. M2006-00457-CCA-R3-CD - Filed November 28, 2006

A Marshall County grand jury returned two indictments against the Defendant, Grady Wayne Mealer, case numbers 16719 and 16721. The Defendant entered open pleas to both indictments. He pled guilty, in case number 16719, to four counts of burglary, two counts of Class A misdemeanor theft, and one count of possession of burglary tools and, in case 16721, to one count of driving on a revoked license. Following a joint sentencing hearing, the trial court ordered the Defendant to serve an effective six-year sentence as a career offender in case number 16719. In case number 16721, the Defendant received an eleven-month and twenty-nine-day sentence with a minimum service of 75%. The trial court ordered the sentences in case numbers 16719 and 16721 to be served consecutively to one another and to a prior six-year sentence for burglary. On appeal, the Defendant argues that the trial court committed sentencing errors and that his two convictions for Class A misdemeanor theft violate principles of double jeopardy.[1] After a review of the record, double jeopardy principles require us to dismiss one of the Defendant's convictions for Class A misdemeanor theft. Therefore, the case is remanded for the entry of corrected judgment forms. In all other aspects, we affirm the sentencing decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part; Reversed in Part; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. MCLIN, JJ., joined.

Michael J. Collins, Assistant Public Defender, Shelbyville, Tennessee, for the appellant, Grady Wayne Miller.

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[1] On March 2, 2006, the Defendant filed a notice of appeal including both case numbers. No motion was made to this Court requesting that the two appeals be consolidated, and we find no order in the record consolidating these two cases. See Tenn. R. App. P. 16. Nevertheless, the parties have filed their briefs and otherwise treated the two appeals as consolidated. For judicial economy, and because the appeals involve common questions of law and facts, this opinion will discuss and dispose of both appeals.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; W. Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

This case arises from the Defendant's guilty pleas and resulting sentences. In 2005, the January term of the Marshall County grand jury indicted the Defendant in two separate cases, case numbers 16719 and 16721.[2] In case number 16719, a seven-count indictment was returned against the Defendant charging him with four counts of burglary of an automobile, two counts of theft of property valued less than $500, and one count of possession of burglary tools. See Tenn. Code Ann. §§ 39-14-103, -105, -402,-701. In case number 16721, the Defendant was charged with driving on a revoked license, ninth offense. See id. § 55-50-504. On December 14, 2005, the Defendant entered open pleas to all charges.

The facts surrounding these charges, as specified at the guilty plea hearing, follow:

> That is going to be State of Tennessee versus Grady Wayne Mealer, docket number 16719.
>
> The State's witnesses are available, they are all subpoenaed to be here Monday morning.
>
> Were you to hear them Monday, they would testify as follows:
>
> This event occurred in Marshall County, Tennessee.
>
> It occurred on April 14th of 2005.
>
> It occurred at a business location known as Brown's Automobile Repair Clean-up Shop owned by Billy Brown.
>
> Mr. Brown had called a dispatcher from the Lincoln County Sheriff's Department, who at the time was also in the private business. He was off duty from dispatching and he was in the alarm business. Glen Liggett.

[2] The Defendant was also indicted for one count of burglary and two counts of theft in case number 16720. He did not pled guilty to this indictment at the December 14, 2005 hearing, and that case was still pending at the time of the sentencing hearing.

He told Mr. Liggett that he was having some difficulties with his alarm system that Mr. Liggett had installed. In fact Mr. Liggett was pulling up to assist Mr. Brown in the repair of that alarm system when Mr. Brown noticed somebody in his enclosed fenced-in lot amongst the cars that were there—that he had there for sale and cars that were there for repair.

He went toward the fence and he hollered at the individual who he knew to be [the Defendant]. He recognized him.

[The Defendant] was at a vehicle, it was a Nissan vehicle, with the doors open leaning over in the car.

Right outside of where [the Defendant] was standing was a bag that was found later to contain a radio out of a car, a Pioneer model radio.

And they—[the Defendant] started coming toward Mr. Brown a little bit and at that time Mr. Brown noticed that he had a screwdriver and a pair of pliers in his hand. [The Defendant] then took off at a fast walk across the back area of the lot where the fence is not as high as it is in the front area and went over toward the woods.

Mr. Brown and Mr. Liggett, who Mr. Liggett was coming in at the time, both noticed a van sitting there, and they both noticed that the van took off. Not at a high rate of speed, just left. They later saw that van again that night after [the Defendant] was taken into custody. [The Defendant's] girlfriend pulls back up in the same van.

But Mr. Liggett and Mr. Brown take off after [the Defendant] through the woods.

There was a long walk and Mr. Liggett would testify he saw [the Defendant] take off his shirt because it was a bright color about the same time that the police pulled up because Mr. Liggett got on the telephone to his dispatch buddies at the police department, started telling them what he had and to come help them. Two or three police cars show up.

As they pull up, [the Defendant] gets underneath a cedar, takes off his shirt, presumably so he won't be spotted.

The officers find another vehicle parked in a cemetery that was [the Defendant's] car.

They go and approach [the Defendant's] car and see [the Defendant] coming out of the woods toward the vehicle and they apprehend him.

In [the Defendant's] pants pocket is the screwdriver which they took into custody, and a pair of pliers which they took into custody as well as the [D]efendant.

In searching the lot, they found that a vehicle owned by Keith and Lisa Burgess that was there for repair and had been locked up in the fenced-in area overnight to be repaired the next day had been entered; the glove compartment had been gone through, papers were scattered around and nothing was taken.

They also found a vehicle belonging to . . . Mr. Brown, a 1992 Nissan and that is the one they saw [the Defendant] in. Nothing was taken.

They also found a 1994 Chevrolet vehicle that was broken into and the dash was messed up but nothing was taken out of it. It had been entered.

. . . [The] 1994 vehicle . . . belonged to Mr. Brown.

They also found a 1984 Chevrolet vehicle that belonged to Mr. Brown that had been entered. Mr. Brown had bought it from a state trooper. Trooper Karparti.

In that was an AM/FM cassette Pioneer radio that had been in there. It had been taken out from the dash.

And Mr. Karparti would come in and say that is the same radio that was found in the bag at [the Defendant's] feet while he was standing by that Nissan. That radio was valued at less than $500.

That is the substance of counts 5 and 6 under two theories.

In count 7, the burglary tools are the pliers and screwdriver.

. . . .

Now the other case, is case 16721.

[The Defendant] is charged in that case with revoked drivers license 9th offense.

. . . .

The police were looking for him in [case 16720] in what the police call a BOLO had been put out. And Officer Woodard with the police department here on May 22nd, 2005, around 10:30 in the evening was on routine patrol here in

> Lewisburg. He knew that they had been looking for [the Defendant] and he saw [the Defendant] pull up.
>
> He knew that [the Defendant] not only was being looked for in a burglary case; he knew [the Defedant] didn't have a driver license.
>
> So he calls and asks if others still want him; he is told they do. So he arrests [the Defendant]. In fact [the Defendant] did not have a driver license, and . . . [h]e had eight prior convictions for driving on a revoked driver license.

A sentencing hearing was held on February 8, 2006. The proof at the sentencing hearing established that the Defendant was thirty-two years old and had completed high school. The Defendant reported that "[h]e last lived with his girlfriend, Brandy Ragsdale, and her two children. The Defendant reports having a child that died at birth in 1992; he was not married to the mother." The presentence report also reflects that, from November 10, 2004, until April 12, 2005, the Defendant worked as a mechanic for Lewisburg Auto Care and was paid $8.50 per hour. "Johnny" of Lewisburg Auto Care advised that, if the Defendant was granted an alternative sentence, the Defendant would not be able to return to work as a mechanic with his company. Prior to employment as a mechanic, the Defendant worked for Walker Die Casting from June to November of 2004. It was also reported that the Defendant lost his job at Walker Die Casting "due to being arrested."

The Defendant's prior criminal history, which spans fourteen years, reflects twenty-five prior convictions, including forgery, theft, burglary, escape, failure to appear, possession of marijuana, violation of Motor Vehicle Habitual Offender orders, driving under the influence of an intoxicant, driving on a revoked or suspended license, and public intoxication. Additionally, the presentence report indicates that the Defendant had previously been placed on the following forms of supervision: Community Corrections Program, parole and enhanced probation, and probation. In 1996, the Defendant's determinate release was revoked due to new convictions and, in 2001, the Defendant's community corrections sentence was revoked due to new charges. At the time of the sentencing hearing in this case, the Defendant was serving a prior six-year sentence as a career offender for burglary of an automobile.

The Defendant testified that alcohol and drugs caused him to commit crimes and that he was on cocaine when he committed the crimes in case number 16719. He further stated,

> I want help but nobody will give me help. I have asked now, all they do is put me in the penitentiary or put me away to where I can't get help. I still got family out there that needs me and stuff. I don't want to be put away forever for drugs. I would like to get some help. I need help.

He also stated that he had previously requested substance abuse help but that the correctional system had failed to provide him with long term treatment. The presentence report reflects that the Defendant has completed the following drug treatment programs: Substance Abuse Phase 1, Substance Abuse Phase 2, and Buffalo Valley Treatment Center.

Following this proof, the trial court, in case number 16719, imposed an effective sentence of six years as a career offender in the Department of Correction—six years as a career offender for each count of burglary and eleven months and twenty-nine days with a minimum service of 75% for each class A misdemeanor conviction. Upon recommendation of the State, the trial court ran the sentences in case number 16719 concurrently to one another. In case number 16721, driving on a revoked license, the trial court imposed a sentence of eleven months and twenty-nine days with a minimum service of 75% in the county jail. The trial court ordered that the sentences in case numbers 16719 and 16721 be served consecutively to one another and consecutively to the Defendant's prior six-year sentence for burglary. In so ruling, the trial court reasoned as follows:

> I do that under TCA 40-35-115 by finding the defendant is an offender whose record of criminal activity is extensive.
>
> He is a career offender by virtue of these felonies.
>
> And I respectfully disagree that his record of misdemeanors is short.
>
> I find that pages 17 through 24 at a minimum cover a multitude of convictions. In addition to those necessary to make him a career offender, would justify consecutive sentencing and frankly he is lucky that the counts in 16719 are not consecutive as well.
>
> I will deny any alternative sentencing as that has been employed in the past without success.

The Defendant appeals this ruling.

ANALYSIS

I. Sentencing

First, the Defendant argues that the trial court committed sentencing errors. The Defendant urges the court to set aside his sentences, arguing that his sentences are excessive, that alternative sentencing was appropriate, and that the trial court erred in imposing consecutive sentences.

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties

on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b);[3] State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court's findings are adequately supported by the record. State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

A. Length of Sentences

The Defendant was convicted of burglary of an automobile, a Class E felony. See Tenn. Code Ann. § 39-14-402(d). If, as in this case, a defendant's present conviction is for a Class D or E felony and the defendant has at least six prior felony convictions of any classification, the defendant qualifies as a career offender. Id. § 40-35-108(a)(3). If the final calculation of the Defendant's prior felony convictions classifies him as a career offender, the Defendant "shall receive the maximum sentence within the applicable Range III." Id. § 40-35-108(c).

The Defendant's remaining convictions—theft of property valued less than $500, possession of burglary tools, and driving on a revoked license—are Class A misdemeanors. See Tenn. Code Ann. §§ 39-14-105(1), 39-14-701, 55-50-504(2). Misdemeanor sentencing is governed by Tennessee

[3] We note that the legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, said changes becoming effective June 7, 2005. However, the Defendant's crime in this case occurred prior to June 7, 2005, and the Defendant did not elect to be sentenced under the provisions of the act by executing a waiver of his ex post facto protections. See 2005 Tenn. Pub. Acts ch. 353 § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

Code Annotated section 40-35-302, and more flexibility is extended in misdemeanor sentencing than in felony sentencing. See State v. Troutman, 979 S.W.2d 271, 273 (Tenn. 1998). Unlike in felony sentencing, defendants are not entitled to a presumptive minimum sentence in misdemeanor sentencing. State v. Seaton, 914 S.W.2d 129, 133 (Tenn. Crim. App. 1995) (citation omitted). Additionally, a misdemeanor sentence, as opposed to a felony sentence, contains no sentence range. State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997). Accordingly, in misdemeanor cases, the trial judge, who is able to observe first-hand the demeanor and responses of a defendant while testifying, must be granted discretion in arriving at the appropriate sentence. Trial judges are merely required to "consider enhancement and mitigating factors when calculating the percentage of a misdemeanor sentence to be served in confinement." Troutman, 979 S.W.2d at 274. Moreover, the misdemeanor sentencing statute does not require the trial court to place its findings on the record. Id.

B. Alternative Sentencing

A defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6); see also State v. Fields, 40 S.W.3d 435, 440 (Tenn. 2001). The following considerations provide guidance regarding what constitutes "evidence to the contrary" which would rebut the presumption of alternative sentencing:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1); see also State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. Id. § 40-35-103(5).

C. Consecutive Sentencing

When a defendant is convicted of multiple crimes, the trial court, in its discretion, may order the sentences to run consecutively if it finds by a preponderance of the evidence that a defendant falls into one of seven categories listed in Tennessee Code Annotated section 40-35-115. With reference to the particular facts of this case, Tennessee Code Annotated section 40-35-115(b) provides that the sentencing court may order sentences to run consecutively if the court finds by a preponderance of the evidence that the defendant is an offender whose record of criminal activity is extensive. Id. § 40-35-115(b)(2).

D. Analysis

First, the State entered into evidence certified copies of judgment forms that reflected that the Defendant had seven prior felony convictions and, therefore, the Defendant qualified as a career offender. See Tenn. Code Ann. § 40-35-108. The trial court had no discretion and was required to impose the maximum sentence for a Class E felony, six years at 60%. See id. §§ 40-35-108(c), 112(c)(5). Furthermore, with regard to the Defendant's misdemeanor sentences, nothing in the record leads us to disturb the trial court's decision. Given the Defendant's lengthy criminal history, the trial court acted within its discretion in setting the misdemeanor sentences.

Second, based upon the Defendant's classification as a career offender, he receives no presumption in favor of alternative sentencing. See id. § 40-35-102(6). From the trial court's comments, we discern the holding to be that "[c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct." Id. § 40-35-103(1)(A). Moreover as connoted by the trial court, the Defendant's prior violations of his alternative sentences demonstrate that "[m]easures less restrictive than confinement have . . . been applied unsuccessfully to the defendant." Id. § 40-35-103(1)(C). The record amply supports the trial court's decision in denying alternative sentencing as the Defendant's potential for rehabilitation is poor. Moreover, the sentence imposed is no greater than that deserved for the offenses committed and is the least severe measure necessary to achieve the purposes for which the sentences are imposed.

Third, in imposing consecutive sentences, the trial court noted the Defendant's extensive criminal history, which as previously stated includes twenty-five convictions. This criminal history is more than sufficient to support the imposition of consecutive sentencing. Id. § 40-35-115(b)(2). It is necessary to find the presence of only one of the statutory categories listed in Tennessee Code Annotated section 40-35-115(b) to support the imposition of consecutive sentencing. State v. Adams, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997)

Upon de novo review, we conclude that the sentences as imposed were appropriate, as the proof established that the aggregate sentence imposed is reasonably related to the severity of the offenses and was necessary to protect the public from further criminal acts of this Defendant who has a long history of criminal conduct. Furthermore, contrary to the assertions of the Defendant, his addiction problems would best be treated in a correctional facility. This issue is without merit.

II. Merger

On appeal, the Defendant argues that his dual convictions for Class A misdemeanor theft violate principles of double jeopardy. Count five charges the Defendant with obtaining control over an AM/FM cassette radio; count six charges exercising control over an AM/FM cassette radio; and both counts allege that the AM/FM cassette radio belongs to Billy Brown. However, the Defendant did not raise this issue in the trial court and, typically under these circumstances, our analysis of an issue is waived. See Tenn. R. App. P. 13(b). Nevertheless, review of this issue is permitted if plain error exists.

Rule 52(b) of the Tennessee Rules of Criminal Procedure provides that "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." Tenn. R. Crim. P. 52(b). In order to find plain error, we must consider five factors:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused [must not have waived] the issue for tactical reasons; and (e) consideration of the error [must be] necessary to do substantial justice.

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (citations and quotations omitted).

Taking these factors in sequence, the record clearly establishes that the Defendant was convicted of counts five and six, both for Class A misdemeanor theft. Second, multiple convictions breach a clear and unequivocal rule of law. Third, a fundamental constitutional right of the Defendant, his Fifth Amendment right to be free from double jeopardy, is affected. Fourth, the Defendant entered open pleas to both indictments. At the guilty plea hearing, the State acknowledges, "That is the substance of counts 5 and 6 under two theories." At the sentencing hearing, the State also admits, "Counts 5 and 6 are different alternative theories of a misdemeanor theft." The record is devoid of any evidence that the Defendant waived the issue for tactical reasons. Fifth, we consider violation of the Defendant's protection against double jeopardy to be sufficiently serious as to require our review in order to do substantial justice. Accordingly, we will review the trial court's error in this regard in spite of the Defendant's failure to raise it as an issue.

The State concedes in its brief that the two convictions for Class A misdemeanor theft should merge. We agree.

It is well established that the double jeopardy guarantees of the Fifth Amendment to the United States Constitution, and article I, section 10 of the Tennessee Constitution, protect individuals from the imposition of multiple punishments for the same offense. North Carolina v. Pearce, 395

U.S. 711, 717 (1969); State v. Denton, 938 S.W.2d 373, 378 (Tenn. 1996). The proper remedy for such situations is a merger of the two convictions into one by vacating the conviction on the lesser offense. State v. Zirkle, 910 S.W.2d 874, 889 (Tenn. Crim. App. 1995).

This Court has previously held that double jeopardy prohibits separate convictions where the same evidence was used to support both theft convictions. See State v. Sharn Green, No. W2003-01176-CCA-R3-CD, 2004 WL 286743, at *4 (Tenn. Crim. App., Jackson, Feb. 12, 2004). Because of double jeopardy prohibitions, we are required to merge the two convictions into a single conviction for theft. We note the Defendant's effective sentence remains unchanged.

CONCLUSION

Because the theft convictions must be merged in order to avoid double jeopardy, we remand for correction of the judgment forms. In all other respects, the sentencing decision of the Marshall County Circuit Court is affirmed.

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DAVID H. WELLES, JUDGE